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14 UNITED STATES DISTRICT COURT
15 NORTHERN DISTRICT OF CALIFORNIA
16 SAN FRANCISCO DIVISION

17 PATRICIA ISABELLE HEWLETT,
18 Appellant,
19 v.
20 JANINA M. ELDER, Trustee,
21 Appellee.

Case No. 07-CV-05883 CRB

**MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS APPEAL
[F.R.C.P. 12(b)(1)]**

Date: February 1, 2008
Time: 10:00 a.m.
Place: 450 Golden Gate Ave.
Courtroom 8, Floor 19
San Francisco, CA

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Appellee Janina M. Elder, Chapter 11 Trustee (the "Trustee") hereby submits this Memorandum in Support of Motion to Dismiss Appeal, as follows:

I. SUMMARY OF THE TRUSTEE'S RULE 12(b)(1) MOTION

This is an appeal by Patricia Hewlett from a September 28, 2007 order issued by Bankruptcy Court Judge Thomas E. Carlson ordering Ms. Hewlett to vacate property of the bankruptcy estate in order to allow the Trustee to sell the property free and clear of liens and interests under Bankruptcy Code Section 363(f). According to Bankruptcy Rule 8002(a), Ms. Hewlett had 10-days, until October 9, 2007, to file a notice of appeal of the September 28 Order. Inexplicably, Ms. Hewlett took various steps, other than filing a timely notice of appeal, in an effort to collaterally attack the September 28 Order. For instance, immediately after the September 28 Order was entered, Ms. Hewlett filed a complaint with the San Francisco Rent Control Board seeking an order allowing her to regain possession. She had her brother move into the property and her brother suddenly claimed to be a residential tenant. She filed a petition for a writ of mandamus in this Court seeking a writ overturning the September 28 Order. However, she never filed a notice of appeal of the September 28 Order within the 10-day time period. After all of Ms. Hewlett's efforts to collaterally attack the September 28 Order failed, she finally filed a notice of appeal on November 5, 2007. However by November 5, the time to appeal had expired.

This motion seeks an order dismissing Ms. Hewlett's appeal because a notice of appeal was not timely filed. The timely filing of a notice of appeal is jurisdictional. Ms. Hewlett's untimely filing of her notice of appeal means that this Court lacks subject matter jurisdiction over the appeal, and the appeal must be dismissed for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1).

II. FACTUAL BASES FOR THE TRUSTEE'S RULE 12(b)(1) MOTION

On September 30, 2006, Sophie Ng filed a chapter 11 bankruptcy and the case was assigned to Bankruptcy Judge Thomas E. Carlson. In December, 2006, Judge Carlson approved

1 the selection of the Appellee as the Chapter 11 Trustee in the case.¹ At the time the bankruptcy
 2 case was filed, Sophie Ng (the “Debtor”) owned various parcels of real property, including a 24-
 3 unit apartment building located at 1385 Clay Street, San Francisco, California (“the Clay
 4 Property”).^{2,3}

5 In January, 2007, Patricia Hewlett filed a proof of claim in the Ng Bankruptcy claiming
 6 that various pre-bankruptcy-petition contracts entitled Ms. Hewlett to manage and operate the
 7 Clay Property.⁴ At the time of the bankruptcy filing, Ms. Hewlett operated the apartment building
 8 at the Clay Property. She had rented units in the building to tenants, and she had received rents
 9 from tenants prior to the bankruptcy filing. Ms. Hewlett continued to operate the building after
 10 the Debtor filed bankruptcy.^{5, 6, 7} It is undisputed that the Clay Property became part of the
 11 bankruptcy estate once the bankruptcy was filed. Ms. Hewlett’s January, 2007 proof of claim
 12 alleged that Ms. Hewlett had the contractual right to buy the Clay Property for \$3 million, even
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 15 ¹ Appellee’s Counter Designation of Record on Appeal, Docket No. 137, Dec. of Janina M. Elder
 16 in Support of Motion to Sell Clay Property and 21st Ave. Property Free and Clear of Liens and
 17 Interests, Par. 1.

18 ² Appellee’s Counter Designation of Record on Appeal, Docket No. 137, Dec. of Janina M. Elder
 19 in Support of Motion to Sell Clay Property and 21st Ave. Property Free and Clear of Liens and
 20 Interests, Par. 2.

21 ³ Appellee’s Counter Designation of Record on Appeal, Docket No. 137, Dec. of Sophie Ng in
 22 Support of Motion to Sell Clay Property and 21st Ave. Property Free and Clear of Liens and
 23 Interests, Par. 1.

24 ⁴ Appellee’s Counter Designation of Record on Appeal, Docket No. 137, Exh. A to Dec. of Sophie
 25 Ng in Support of Motion to Sell Clay Property and 21st Ave. Property Free and Clear of Liens and
 26 Interests, Par. 20.

27 ⁵ Appellee’s Counter Designation of Record on Appeal, Docket No. 183, Dec. of Mark Benson
 28 Regarding Order to Recover Past-Due Rents, Future Rent Payments, Security Deposits, and an
 Order Removing Ms. Hewlett From the Property, Pars. 4-12.

⁶ Appellee’s Counter Designation of Record on Appeal, Docket No. 180, Dec. of Jeffrey L.
 Fillerup Regarding Order to Recover Past-Due Rents, Future Rent Payments, Security Deposits,
 and an Order Removing Ms. Hewlett From the Property, Pars. 1-8.

⁷ Appellee’s Counter Designation of Record on Appeal, Docket No. 137, Dec. of Janina M. Elder
 in Support of Motion to Sell Clay Property and 21st Ave. Property Free and Clear of Liens and
 Interests, Pars. 7,11.

1 though the fair market value was close to \$5 million.^{8,9}

2 After the Trustee's appointment was approved by Judge Carlson, the Trustee filed an
3 adversary proceeding against Ms. Hewlett, alleging that the pre-bankruptcy-petition contracts
4 which were the basis of Ms. Hewlett's proof of claim had been induced by fraud, breach of
5 fiduciary duty, and elder abuse.¹⁰ The Trustee's complaint also objected to Ms. Hewlett's proof
6 of claim. The Trustee took the position that Ms. Hewlett did not have the right to buy the Clay
7 Property for \$3 million, or any price, because the alleged contracts relied on by Ms. Hewlett were
8 unenforceable, unconscionable, and they were induced by fraud and breach of fiduciary duty.^{11,12}

9 The Trustee then filed a motion to sell the Clay Property free and clear of liens and
10 interests pursuant to 11 U.S.C. Section 363(f).¹³ This motion specifically sought an order allowing
11 the Trustee to sell the Clay Property free and clear of Ms. Hewlett's proof of claim and any other
12 interests. Ms. Hewlett filed an opposition to the Trustee's 363(f) motion on July 20, 2007. Ms.
13 Hewlett's counsel, James Attridge, attended the hearing of the 363(f) motion on August 3, 2007,
14 and Mr. Attridge argued against the granting of the motion.¹⁴ At the hearing, Judge Carlson

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16 ⁸ Appellee's Counter Designation of Record on Appeal, Docket No. 183, Dec. of Mark Benson
17 Regarding Order to Recover Past-Due Rents, Future Rent Payments, Security Deposits, and an
Order Removing Ms. Hewlett From the Property, Pars. 5-13.

18 ⁹ Appellee's Counter Designation of Record on Appeal, Docket No. 137, Dec. of Sophie Ng in
19 Support of Motion to Sell Clay Property and 21st Ave. Property Free and Clear of Liens and
Interests, Pars. 18-20.

20 ¹⁰ Appellee's Counter Designation of Record on Appeal, Docket No. 137, Exh. A to Dec. of
21 Sophie Ng in Support of Motion to Sell Clay Property and 21st Ave. Property Free and Clear of
Liens and Interests at Pars. 10-28, 38-42, 52-60 and 82-95.

22 ¹¹ Appellee's Counter Designation of Record on Appeal, Docket No. 137, Exh. A to Dec. of
23 Sophie Ng in Support of Motion to Sell Clay Property and 21st Ave. Property Free and Clear of
Liens and Interests at Pars. 10-28, 38-42, 52-60, and 82-95.

24 ¹² Appellee's Counter Designation of Record on Appeal, Docket No. 137, Memorandum of Points
25 and Authorities in Support of Motion to Sell Clay Property and 21st Ave. Property Free and Clear
of Liens and Interests, p. 7, lines 15-28; p. 8, lines 1-2.

26 ¹³ Appellee's Counter Designation of Record on Appeal, Docket No. 137, Notice of Motion and
27 Motion to Sell Clay Property and 21st Ave. Property Free and Clear of Liens and Interests.

28 ¹⁴ Hearing Transcripts Previously Designated By Appellee, Hearing Transcript of August 3, 2007
(submitted to Bankruptcy Court on December 18, 2007).

1 articulated the grounds for granting the motion, which included a finding that the Trustee's
 2 adversary complaint against Ms. Hewlett alleged a "bona fide dispute" concerning the allegations
 3 that Ms. Hewlett had breached of her fiduciary duties to the Debtor in entering into the alleged
 4 pre-petition contracts with the Debtor.¹⁵ Judge Carlson entered an order granting the 363(f)
 5 motion on August 20, 2007, subject to Ms. Hewlett asserting a claim for money damages based on
 6 her proof of claim.¹⁶ The 363(f) order allowed the Trustee to market and sell the Clay Property.
 7 The order also ordered Ms. Hewlett to cooperate in the Trustee's efforts to market and sell the
 8 Clay Property. Ms. Hewlett did not cooperate in the Trustee's efforts to sell the Property.¹⁷ In
 9 spite of Ms. Hewlett's efforts to interfere with and frustrate the Trustee's efforts to sell the Clay
 10 Property, the Trustee received multiple offers from prospective buyers.

11 In September, 2007, the Trustee entered into a contract to sell the Property to A.J. Batt for
 12 \$4.68 million (the "Batt Contract").¹⁸ A condition of the Batt Contract required that the Trustee
 13 remove Ms. Hewlett from the Property because Ms. Hewlett claimed to reside in one of the
 14 apartments (unit #3) on the Clay Property.¹⁹ Judge Carlson approved the proposed sale to A.J.
 15 Batt and allowed the Trustee to file a motion seeking the removal of Ms. Hewlett from the Clay
 16 Property in order to satisfy the condition in the Batt Contract.²⁰ On September 19, 2007, the

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 18 ¹⁵ Hearing Transcripts Previously Designated By Appellee, Hearing Transcript of August 3, 2007
 (submitted to Bankruptcy Court on December 18, 2007).

19 ¹⁶ Appellee's Amended Counter Designation of Record on Appeal, Docket No. 169, Order
 20 Authorizing Trustee to Sell Clay Property and 21st Avenue Property Free and Clear of Liens and
 21 Interests (filed in District Court on December 28, 2007).

22 ¹⁷ Appellee's Counter Designation of Record on Appeal, Docket No. 183, Dec. of Mark Benson
 23 Regarding Order to Recover Past-Due Rents, Future Rent Payments, Security Deposits, and an
 Order Removing Ms. Hewlett From the Property, Pars. 4 -12.

24 ¹⁸ Appellee's Counter Designation of Record on Appeal, Docket No. 186, Dec. of Janina M. Elder
 Regarding Patricia Hewlett's Objection to Sale, Pars. 1- 4.

25 ¹⁹ Appellee's Counter Designation of Record on Appeal, Docket No. 186, Dec. of Janina M. Elder
 26 Exh. "1."

27 ²⁰ Appellee's Amended Counter Designation of Record on Appeal, Docket No. 197, Order
 28 Confirming Sale to Trustee's Buyer Overruling Objection and Authorizing Payment of Real Estate
 Commission to Trustee's Buyer (filed in District Court on December 28, 2007).

1 Trustee filed a motion to remove Ms. Hewlett from the Clay Property.²¹ The Trustee's motion
 2 was heard on September 28, 2007.²² Ms. Hewlett did not file a written opposition to the
 3 Trustee's motion, although her attorney, James Attridge, did appear at the hearing on September
 4 28, 2007 to oppose the motion. At the hearing on September 28, 2007, Judge Carlson granted the
 5 motion and ordered Ms. Hewlett removed from the Property, and a written order was entered that
 6 same day, September 28, 2007 (the "September 28 Order").²³

7 After the September 28 Order was entered, Ms. Hewlett attempted to collaterally attack
 8 the September 28 Order in a variety of ways, however, she did not file a notice of appeal within
 9 10-days of entry of the order. After the hearing on September 28, Ms. Hewlett filed a complaint
 10 against the Trustee with the San Francisco Rent Control Board (the "Board") claiming that Ms.
 11 Hewlett was a residential tenant in unit #3 and that she had been wrongfully evicted.²⁴ The
 12 Trustee filed a request for dismissal of the complaint with the Board, on two grounds: (1) Ms.
 13 Hewlett's complaint violated the automatic bankruptcy stay, and (ii) the Bankruptcy Court had
 14 exclusive jurisdiction over the Clay Property because it was an asset of the bankruptcy estate.²⁵
 15 The Board granted the Trustee's request for a dismissal, and it dismissed the complaint.²⁶

17 ²¹ Appellee's Counter Designation of Record on Appeal, Docket No. 179, Trustee's Memorandum
 18 in Support of Order to Recover Past-Due Rents, Future Rent Payments, Security Deposits, and an
 19 Order Removing Ms. Hewlett From the Property.

20 ²² Hearing Transcripts Previously Designated By Appellee, Hearing Transcript of September 28,
 2007 (submitted to Bankruptcy Court on December 18, 2007).

21 ²³ Appellee's Amended Counter Designation of Record on Appeal, Docket No. 193, Order re
 22 Turnover of Real Property at 1385 Clay Street, San Francisco, CA (filed in District Court on
 December 28, 2007).

23 ²⁴ Appellee's Counter Designation of Record on Appeal, Docket No. 243, Exh. G to Dec. of
 24 Jeffrey L. Fillerup in Support of Motion to Amend Order re Turnover of Real Property at 1385
 Clay St.

25 ²⁵ Appellee's Counter Designation of Record on Appeal, Docket No. 243, Exh. H to Dec. of
 26 Jeffrey L. Fillerup in Support of Motion to Amend Order re Turnover of Real Property at 1385
 Clay St.

27 ²⁶ Appellee's Counter Designation of Record on Appeal, Docket No. 243, Dec. of Jeffrey L.
 28 Fillerup in Support of Motion to Amend Order re Turnover of Real Property at 1385 Clay St.,
 Pars. 8 -11.

1 Ms. Hewlett caused her brother (Javier Rivera) to take possession of unit #3 at the Clay
 2 Property, and Mr. Rivera then claimed to be a residential tenant in unit #3. Mr. Rivera made this
 3 claim even though Ms. Hewlett had claimed that she was a residential tenant in unit #3 in her
 4 September 28 complaint to the Board. The Trustee demanded that Mr. Rivera vacate unit #3,
 5 and he refused.²⁷ The Trustee was not able to close on the sale of the Clay Property to Mr. Batt
 6 while Ms. Hewlett or her brother continued to occupy unit #3. Judge Carlson allowed the
 7 Trustee to depose Mr. Rivera about his claim to be a residential tenant in unit #3. Mr. Rivera
 8 testified that he had never slept in unit #3 until just a few weeks before the deposition, and when
 9 he was cross-examined further during the deposition about his claim to have lived in unit #3 for
 10 several years, he refused to answer any further questions based upon the Fifth Amendment right
 11 against self incrimination.²⁸ The deposition could not be completed because of Mr. Rivera's
 12 repeated assertions of the Fifth Amendment and his refusal to answer questions about his alleged
 13 tenancy at the Clay Property.

14 The Trustee then sought an order shortening time for a motion to remove Mr. Rivera from
 15 the Clay Property, which was granted, and Judge Carlson heard the Trustee's motion on
 16 November 2, 2007. Judge Carlson granted the Trustee's motion and entered an order on
 17 November 2, 2007 removing Mr. Rivera from the Property that day (the "November 2 Order").²⁹
 18 The Trustee was then able to close on the Batt Contract, and the sale of the Clay Property to Mr.
 19 Batt closed on November 16, 2007. Mr. Rivera has filed a notice of appeal of the November 2
 20 Order, but he subsequently dismissed the appeal with prejudice.

21 On or about October 30, 2007, Ms. Hewlett filed a petition for a writ of mandamus in this
 22 Court, in a case captioned Patricia Hewlett v. United States Bankruptcy Court, Case No. C07-

23 ²⁷ Appellee's Counter Designation of Record on Appeal, Docket No. 243, Dec. of Jeffrey L.
 24 Fillerup in Support of Motion to Amend Order re Turnover of Real Property at 1385 Clay St., Par.
 15.

25 ²⁸ Appellee's Counter Designation of Record on Appeal, Docket No. 243, Dec. of Jeffrey L.
 26 Fillerup in Support of Motion to Amend Order re Turnover of Real Property at 1385 Clay St.,
 Pars. 12-15.

27 ²⁹ Appellee's Amended Counter Designation of Record on Appeal, Docket No. 247, Order Re
 28 Turnover of Real Property at 1385 Clay Street, San Francisco, CA (Javier Rivera).

05532CRB (the “Mandamus Action”). Ms. Hewlett sought a writ of mandamus ordering the Bankruptcy Court to vacate the September 28 Order on the alleged ground that her lawyer did not have adequate notice of the September 28, 2007 hearing. The Mandamus Action was assigned to Judge Breyer, and he denied the petition on October 31, 2007.³⁰

Finally, on November 5, 2007, Ms. Hewlett filed a notice of appeal of the September 28 Order. This is 38 days after the September 28 Order was entered. The appeal was assigned to Judge Jenkins on November 20, 2007. The Trustee filed an administrative motion to have Ms. Hewlett’s appeal related to the previously-filed Mandamus Action. The administrative motion was granted and the appeal was re-assigned to Judge Breyer. Like the Mandamus Action, Ms. Hewlett’s appeal also claims that her lawyer did not have adequate notice of the hearing of the Trustee’s motion to remove her from the Clay Property on September 28, 2007.

III. ARGUMENT

A. The September 28 Order Was a Final Order Under Rule 8002(a)

The September 28 Order was a final order of the Bankruptcy Court under Bankruptcy Rule 8002(a). A Bankruptcy Court order is final if it constitutes a complete adjudication of the issues at bar and evidences the judge’s intention that it be final. *In re Wiersma*, 483 F.3d 933, 938 (9th Cir. 2007). In *In re Slimick*, 928 F.2d 304 (9th Cir. 1990), the Ninth Circuit discussed the difference in the “finality” rule between District Court and Bankruptcy Court proceedings. In District Court, the “finality rule” states that an appeal may lie from “a complete act of adjudication [that] ends the litigation on the merits and leaves nothing for the court to do but execute a judgment.” 928 F.2d at 307. Whereas in Bankruptcy Court, the time to appeal commences whenever the Bankruptcy Court issues an order or judgment that resolves any of the many interim disputes that arise during the course of a bankruptcy proceeding. *In re Slimick*, 928 F.2d 304, 307 (9th Cir. 1990); *Morn v. Strauss*, 1996 U.S.Dist.Lexis 12021 (N.D.Cal. 1996)(holding that order rejecting certain executory contracts were appealable orders under Rule

³⁰ The Trustee requests that the Court take judicial notice of the pleadings filed by Patricia Hewlett in Case No. 07-CV-05532 CRB, and the Court’s order denying Ms. Hewlett’s petition for a writ of mandamus.

1 8002(a)). “[A] bankruptcy court order is appealable where it 1) resolves and seriously affects
 2 substantive rights and 2) finally determines the discrete issue which it is addressed.” *In re*
 3 *Wiersma*, 483 F.3d 933, 939 (9th Cir. 2007)(quoting *In re Frontier Properties, Inc.*, 979 F.2d
 4 1358, 1363 (9th Cir. 1992)).

5 In this case, the September 28 Order was a final order of the Bankruptcy Court removing
 6 Ms. Hewlett from the Clay Property and turning possession of the property over to the Trustee, in
 7 order to allow the Trustee to finalize the sale to Mr. Batt. This was a final order in the context of
 8 this bankruptcy because it contemplated that once Ms. Hewlett was removed from the Clay
 9 Property, the Clay Property would be sold, and she could not recover possession back because the
 10 property would be sold to Mr. Batt.

11 The September 28 Order uses language that evinces the Bankruptcy Court’s intent that the
 12 order was final. The order states: “2. Effective 12:00 noon September 28, 2007, all possessory,
 13 management, ownership, and other interests of Patricia Hewlett in the Property are terminated.”
 14 It goes on to state: “3. Effective 12:00 noon September 28, 2007, Trustee shall enjoy all
 15 possessory, management, ownership, and other rights in the Property until the sale of the Property
 16 closes or until this court orders otherwise.” The September 28 Order finally adjudicated rights
 17 claimed by Ms. Hewlett to possession of the property, and made clear that she had no further
 18 possessory rights in the Clay Property. Ms. Hewlett certainly understood the order as a final
 19 adjudication of her rights to possess, manage and receive rents because that same day (September
 20 28), after the Bankruptcy Court hearing, she filed a complaint against the Trustee with the San
 21 Francisco Rent Control Board, claiming that she had been wrongfully removed from the Clay
 22 Property.

23 In light of the circumstances surrounding Ms. Hewlett’s removal from the Clay Property
 24 and the clear language in the Bankruptcy Court’s order, the September 28 Order was a final order
 25 of the Bankruptcy Court for purposes of Bankruptcy Rule 8002(a).

26 **B. Ms. Hewlett’s Time to Appeal Expired on October 9, 2007**

27 Bankruptcy Rule 8002(a) states that a “notice of appeal [from an order of the Bankruptcy
 28 Court] shall be filed within 10 days of the date of entry of the judgment, order, or decree appealed

1 from.” In this case, the Bankruptcy Court entered the September 28 Order immediately after the
2 hearing on September 28, 2007.

3 The 10-day time period begins to run when the order is entered, not when notice is
4 provided. Bankruptcy Rule 9022 states that the lack of notice of the entry of an order does not
5 affect the time to appeal or relieve a party for failure to appeal within the time allowed, except as
6 permitted by Rule 8002. Thus, there is no issue about notice of entry of the order to Ms. Hewlett
7 for several reasons. First, Ms. Hewlett’s counsel was present in court on the morning of
8 September 28, 2007 when Judge Carlson granted the Trustee’s motion. Second, even if Ms.
9 Hewlett counsel’s were not present in court, the 10-day period does not begin to run based on
10 notice to a party, it begins to run when the order is entered. *E.g., In re Sweet Transfer & Storage*
11 *Inc.*, 896 F.2d 1189, 1193 (9th Cir. 1990)(the parties must monitor the dockets to inform
12 themselves of the entry of orders they may wish to appeal); *State of Maryland v. Genuity, Inc.*,
13 2003 U.S.Dist.Lexis 10637 (S.D.N.Y. 2003).

14 Bankruptcy Rule 9006(a) provides the rules for computing time in a bankruptcy case.
15 According to Rule 9006(a), the date of entry of the order appealed from is not counted in the
16 computation of the 10-day time period, but the last day of the period so computed is included,
17 unless it is a Saturday, Sunday or holiday. *Delafield 246 Corp. v. City of New York*, 2007
18 U.S.Dist.Lexis 85356 (S.D.N.Y. 2007). Applying Rule 9006(a)’s computation rules, Ms.
19 Hewlett’s last day for filing a notice of appeal of the September 28 Order was Tuesday, October 9,
20 2007. Ms. Hewlett did not file her notice of appeal until November 5, 2007. Ms. Hewlett’s
21 notice of appeal was untimely by 27 days.

22 **C. The Untimely Filing of the Notice of Appeal is Jurisdictional and Means that**
23 **this Court Lacks Subject Matter over the Appeal**

24 The timeliness of a notice of appeal from a Bankruptcy Court order is a question of law.
25 *Saunders v. Band Plus Mortgage Corp.*, 31 F.3d 767 (9th Cir. 1994). The 10-day period for filing
26 a notice of appeal is also strictly construed, *e.g., Delaney v. Alexander*, 29 F.3d 516, 518 (9th Cir.
27 1994), and it is mandatory, *e.g., Warrick v. Birdsell*, 278 B.R. 182, 185 (9th BAP 2002); *In re*
28 *Rebel Rents*, 326 B.R. 791, 797 (Bankr. C.D. Cal. 2005). The time-to-appeal provisions in Rule

1 8002(a) are jurisdictional, meaning that the untimely filing of a notice of appeal deprives the
2 appellate court of jurisdiction to review the Bankruptcy Court's order. *E.g., Saunders v. Band*
3 *Plus Mortgage Corp.*, 31 F.3d 767 (9th Cir. 1994); *In re Rebel Rents*, 326 B.R. 791, 797
4 (Bankr. C.D. Cal. 2005); *Morn v. Strauss*, 1996 U.S. Dist. Lexis 12021 (N.D. Cal. 1996). In
5 *Saunders*, the Ninth Circuit held that the District Court had properly dismissed the appellant's
6 appeal as untimely because the notice of appeal was filed 12 days after the Bankruptcy Court's
7 order was entered.

8 While Rule 8002(c)(2) does allow a party to ask the Bankruptcy Court to extend the time
9 in which to file a notice of appeal during the 20-day period after the time to appeal expired, in
10 this case Ms. Hewlett never filed the motion with the Bankruptcy Court. Instead, Ms. Hewlett tried
11 various other ways to attack the Bankruptcy Court's September 28 Order.

12 Even if Ms. Hewlett had taken advantage of the provisions of Rule 8002(c)(2), she would
13 have had the burden of proving that the failure to file a timely notice of appeal within 10-days was
14 the result of "excusable neglect". Ms. Hewlett could not have satisfied her burden of proving
15 "excusable neglect" under Rule 8002(c)(2). The "excusable neglect" standard requires that the
16 court examine all relevant factors, including prejudice to the Trustee, the impact of delay on the
17 pending bankruptcy proceeding, the reasons for the delay, and whether Ms. Hewlett acted in good
18 faith. *In re Rebel Rents*, 326 B.R. 791, 799 (Bankr. C.D. Cal. 2005).

19 Ms. Hewlett could not have established "excusable neglect" because the Trustee was under
20 time pressure to have Ms. Hewlett removed from the Clay Property in order to satisfy a condition
21 in the Batt Contract and the sale could not have closed while Ms. Hewlett continued to occupy
22 unit #3. If the Trustee was not able to remove Ms. Hewlett from the Clay Property, then the
23 estate risked losing the sale to Mr. Batt, and it risked having to undertake the process of marketing
24 and selling the Clay Property again, possibly at a lower price. Second, Ms. Hewlett was aware of
25 the September 28 Order on the day the order was entered because she immediately filed an
26 complaint with the San Francisco Rent Control Board. This complaint was a violation of the
27 automatic stay, which is another fact that would prevent Ms. Hewlett from proving excusable
28 neglect. The immediate filing of the complaint with the Rent Control Board shows that Ms.

1 Hewlett knew on (September 28) that the order was in effect, that it removed her from the Clay
2 Property, and that she would be permanently removed from the Clay Property unless the
3 September Order was reversed. She simply chose the wrong way to attack the September 28
4 Order. In the *Rebel Rents* case, the Court found that the 10-day period to appeal in Rule 8002(a)
5 is "crystal clear" and that an attorney's failure to read and comprehend the rule is not "excusable
6 neglect".

7 **IV. CONCLUSION**

8 Because Ms. Hewlett's notice of appeal was filed 38 days after the entry of the September
9 28 Order, her appeal is untimely and this Court lacks subject matter jurisdiction to hear the merits
10 of the appeal. The Trustee's motion to dismiss pursuant to Federal Rule of Civil Procedure
11 12(b)(1) should be granted in light of the untimely filing of the notice of appeal.

12 DATED: December 28, 2007 LUCE, FORWARD, HAMILTON & SCRIPPS LLP

13
14 By: 

15 Jeffrey L. Fuller
16 Attorneys for Appellee JANINA M. ELDER,
Chapter 11 Trustee

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